Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

RAYMOND VEGA,

Petitioner,

v.

REXENE CORPORATION,

Respondent

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner Raymond Vega, the Plaintiff, may maintain a wrongful termination suit for post-petition, post-plan, pre-confirmation conduct by a Chapter 11 Defendant.

2. Whether Petitioner Raymond Vega may maintain a suit for reinstatement for a wrongful termination committed by a post-petition, post-plan, pre-confirmation Chapter 11 employer.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
CONCLUSIONS	11
APPENDIX A	12
APPENDIX B	12
APPENDIX C	12
UNITED STATES STATUTORY PROVISION	
11 U.S.C. sec. 503	11
11 U.S.C. sec. 1141	2, 7, 8

TABLE OF AUTHORITIES

Page

CASES

Alexandria Associates, Ltd. v. Mitchell, 2 F.3d 598 (5th Cir. 1986) 7

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 6

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6

In Re Chateaugay, 944 F.2d 997 (2nd Cir. 1991) 11

Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) 8

New York v. N.Y., N.H. H. Ry. Co., 344 U.S. 293 (1952) 11

Randolph v. Resolution Trust Corporation, 995 F.2d 911 (5th Cir. 1993) 7

Reliable Elec. Co.. Inc. v. Olson Const. Co.,726 F.2d 620 (10th Cir. 1984) 10

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PETITION FOR WRIT OF CERTIORARI

RAYMOND VEGA, Plaintiff before the United States District Court for the Western District of Texas, Midland-Odessa Division in Cause No. MO-94-CA-103 and Appellant before the United States Court of Appeals for the Fifth Circuit, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is attached hereto as Appendix B. The District Court's judgment is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 20, 1995. No petition for rehearing was filed. Jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. sec. 1141 provides:

> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as provided in subsections (d)(2) and (d)(3)

STATEMENT

The facts necessary to place in their setting the questions now raised can be briefly stated:

(i) **Course of Proceedings and Disposition Below**

Petitioner, Raymond Vega, was the Plaintiff in Case No. MO-94-CA-103, which was commenced by the filing of a Complaint in the United States District Court for the Western District of Texas (App. sec. II). The named defendant in Case No. MO-94-CA-103 was Rexene Corporation.

In his Complaint, Vega alleged that he was a hispanic citizen of the United States; that he was employed by the Defendant on May 14, 1974, as a mechanic at the Defendant's Polyurethane Extruder Building; that he was injured on the job on October 10, 1990; that he had heart surgery on May 16, 1992; that the defendant did not provide reasonable accommodation for the Plaintiff despite providing extended leaves of absence for Anglo employees; and that he was discharged on June 10, 1992. Vega alleged that the employer's conduct violated the provisions of Title VII, which prohibit discrimination based on race and national origin. Petitioner prayed for the recovery of (1) compensatory damages for past and future mental anguish; (2) lost wages and benefits; and (3) reinstatement to his former position or front pay. Petitioner alleged that the conduct of the Defendant was willful, malicious, wanton or in conscious disregard of Petitioner's right. As such, Vega requested in his Complaint the recovery of punitive damages.

Rexene's responsive pleading came in the form of a Motion to Dismiss and for Imposition of Sanctions Including Attorney's Fees (App. sec. III). Appellee urged that

Appellant's suit was subject to the discharge provisions of Chapter 11 of the United States Bankruptcy Code. Rexene contended that the termination came prior to the Order Confirming First Amended Plan of Reorganization, which occurred on July 7, 1992. Rexene moved for dismissal pursuant to the provisions of Rule 12(b)(6), Federal Rules of Civil Procedure.

The District Court entered a Notice of Intent to Treat Motion to Dismiss as Motion for Summary Judgment (App. sec. VI). Thereafter, Appellee filed a Motion for Summary Judgment (App. sec. VII).

On October 3, 1994, the District Court entered an Order granting Appellee's motion for summary judgment (App. sec. VIII). Based on the order, the District Court entered a judgment in favor of Appellee (App. sec. IX).

On November 2, 1994, Appellant perfected his appeal by filing a Notice of Appeal.

(ii) **Fact Statement**

On May 14, 1974, Rexene employed Raymond Vega, Petitioner, as a mechanic in the polyurethane extruder building. On October 10, 1990, Appellant injured his back on the job. On October 18, 1991, Rexene Corporation, Rexene Products Co. and Poly-Pac, Inc. filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code in the United States District Court for the District of Delaware. The Bankruptcy case was docketed under Case Nos. 91-1057 through 91-1059.

On April 29, 1992, Rexene Corporation, Rexene Products and Poly-Pac filed their First Amended Plan of

Reorganization and the First Amended Joint Disclosure Statement and Summary of Plan Classes 4, 5, and 8.

On May 16, 1992, Petitioner underwent heart surgery. On June 10, 1992, Vega was fired by Ronnie Jones, manager for Rexene.

On July 7, 1992, the Bankruptcy Court signed the Order Confirming First Amended Plan of Reorganization. On July 28, 1992, Appellee filed in the United States Bankruptcy Court a Notice Final Date for Filing Administrative Claims and a Notice of Confirmation of Debtors' First Amended Plan of Reorganization.

The Administrative Bar date was set for September 8, 1992. The merger date occurred on September 11, 1992. Vega did not file a proof of claim within the time period.

On October 1, 1992, Vega filed a Charge of Discrimination with the Texas Human Rights Commission. He stated in his charge that he was fired from his position as a mechanic on June 10, 1992, but received a letter dated June 15, 1992, from Ronnie Jones, Manager, that he was terminated. He further stated that he was discriminated against because of his national origin. (App. Sec. III, 68) .

Rexene responded to the Equal Employment Opportunity Commission that Petitioner was given notice of confirmation and notice of administrative bar date and that he did not file a proof of claim by September 8, 1992.

On May 10, 1994, the Equal Employment Opportunity Commission issued a Right to Sue Letter to Vega. Vega filed his Complaint in the United States District Court for the Western District of Texas, Midland Division on May 19, 1994.

REASONS FOR GRANTING PETITION

Petitioner's Title VII claim was not discharged by the Confirmation Order because Appellant was not given sufficient notice as required by the due process clause of the administrative claim procedure. Also, Petitioner's claim for reinstatement is not discharged because it is not a debt as stated by the Confirmation Order.

Petitioner was terminated one month prior to a confirmation order which was signed reorganizing his employer. From a policy standpoint, a Chapter 11 estate should not be permitted to violate federal discrimination laws prior to the entry of a confirmation order and receive a discharge without providing sufficient warnings to the employee of the effect of a chapter 11 confirmation.

The District Court disposed of this case under the provisions of Rule 56, Federal Rules of Civil Procedure. Fed.R.Civ.P. 56(c) provides that summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). In determining whether summary judgment is warranted, the appellate court reviews the record and the pleadings, independently, viewing all fact questions in a light most favorable to the nonmovant and considering legal questions de novo. *Alexandria Associates, Ltd. v. Mitchell Co.*, 2 F.3d 598, 600-601 (5th Cir. 1993). Appellant would urge that the Court of Appeals can reverse a district court's summary judgment if the claims and defenses below have not been sufficiently developed. See *Randolph v. Resolution Trust Corporation*, 995 F.2d 611, 620 (5th Cir. 1993).

11 U.S.C. sec. 1141 provides:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502 (i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after the consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

11 U.S.C.A. sec. 1141 (West 1993).

In this case, Petitioner's employment discharge occurred

post-petition. Petitioner's employment discharge also occurred after the plan was filed. Vega's discrimination is not specifically addressed by name in the plan or in the confirmation order.

Rexene has stated that it mailed to Petitioner a copy of a notice of final date for filing administrative claims. This notice provides a September 8, 1992, bar date. This notice was insufficient to give Petitioner notice. This insufficiency of notice violated Petitioner's rights of due process.

In *Mullane v. Central Hanover Bank,* 339 U.S. 306 (1950), the United States Supreme Court considered whether notice provisions of state law satisfied the standards of due process. The Court ruled that

> "[A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculate, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections...the notice must be of such nature as reasonably to convey the required information.

Id. at 314. In that case, the Supreme Court held that notice by publication was insufficient to inform interested parties that their rights were being adjudicated where the identity of such parties was ascertainable.

In *New York v. N.Y. N.H. & H. Ry. Co.,* 344 U.S. 293 (1952), the Supreme Court held that notwithstanding a bar order previously entered in the case which prohibited the filing of claims after a specified date, the City of New York was not precluded from asserting a lien against property of the railroad after entry of an order of confirmation. The Court ruled

that published notice of the bar order was insufficient since the trustee of the railroad was aware of the city's claim and should have given actual notice to the City of the entry of the order. The Court ruled that the City's claims survived confirmation even though the City had knowledge of the reorganization proceeding.

In this case, Petitioner was not given actual notice of the bankruptcy or of the confirmation hearing. *Reliable Elec. Co. Inc. v. Olson Const. Co.*, 726 F.2d 620, 622-623 (lOth Cir. 1984). The notice of final date for filing administrative claims is ambiguous. The notice states in pertinent part: "September 8, 1992 (the 'Bar Date') is the last day for any creditor, other than those creditors described in the last paragraph hereof, to assert any and all claims that such creditor wishes to assert against the above-referenced Debtors arising out of or relating to the Debtors' post-petition (i.e., on or after October 18, 1991) operations and activities that are entitled to administrative priority pursuant to Section 503(a) and 507(a)(1) of the Bankruptcy Code ('Administrative Claims'), by filing a proof of claim against the pertinent Debtor(s)."

The notice fails to give Petitioner, an individual, notice to file a proof of claim from a tort, i.e., a wrongful termination, committed by the Debtor. This ambiguity is magnified because the last paragraph excuses a claimant from filing an administrative claim with respect to obligations to employees of a Debtor for wages, salary, expense reimbursements, commissions, benefits or other forms of compensation. A central element of recovery in a Title VII is backpay. Combining the notice language in the first paragraph with the final paragraph would mislead a reasonably situated terminated employee.

The notice also violates the due process clause because it fails to give notice that a late filed proof of claim may be permitted by the bankruptcy court for cause. 11 U.S.C. sec. 503. This requirement in the tort context is crucial. Under Title VII, a terminated employee may not learn of sufficient facts in time to meet the deadline. Title VII accords the employee a 180-day deadline from filing a charge. If the state the employee resides is a referral state, then the charge may be filed within 300 days of the discharge.

Petitioner also urges that the reinstatement portion of his Title VII claim is not dischargeable. The Confirmation Order states that each debtor "shall be discharged from any and all debts that arose against it before the date of entry of this Confirmation Order." (App. sec. III, 30). Reinstatement, which is an equitable remedy, would not represent a debt unless there was a finding of discrimination. This finding would be post-confirmation. Reinstatement would not create a claim against the property of the estate, but only a claim against future revenues. See *In Re Chateaugay Corp.*, 944 F.2d 997 (2nd Cir. 1991).

For the foregoing reasons, Petitioner requests that the United States Supreme Court grant this Petition, that the United States Supreme Court reverse the summary judgment of the District Court and the judgment of the Court of Appeals affirming the District Court's judgment.

CONCLUSION

In conclusion, Petitioner, Raymond Vega, respectfully requests that the Supreme Court grant this petition for writ of certiorari, reverse the summary judgment entered against Vega by the District Court and the judgment of the Court of Appeals and remand this case to the District Court for trial on the merits.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50733
Summary Calendar

RAYMOND P. VEGA,

Plaintiff-Appellant,

v.

REXENE CORPORATION

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(M0-94-CA-103)

Before KING, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:

Raymond P. Vega appeals from the district court's grant of summary judgment for Rexene Corporation. Because we find no genuine issue of material fact, we affirm the judgment of the district court.[1]

[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 18, 1991, Rexene Corporation ("Rexene") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. As a Rexene employee, Vega was scheduled as a potential creditor, and during the course of the bankruptcy proceedings, he received various notices and mailings that were sent to the creditors of Rexene.

On June 10, 1992, Vega's employment with Rexene was terminated. On July 7, 1992, the bankruptcy court entered an "Order Confirming First Amended Plan of Reorganization" (the "confirmation order") in Rexene's bankruptcy proceedings. The confirmation order established September 8, 1992, as the deadline for filing administrative claims against Rexene. Notice of the confirmation order and of the deadline for filing administrative claims was mailed to Vega on July 30, 1992. Vega, however, did not file any administrative claims.

On September 11, 1992, pursuant to the confirmed plan of reorganization, old Rexene Corporation was merged into Rexene Products Company. Rexene Products Company subsequently changed its name to Rexene Corporation. The plan of reorganization was consummated on September 18, 1992, and Rexene was granted a discharge pursuant to 11 U.S.C. §§ 524 and 1141.

On May 19, 1994, Vega filed a wrongful termination lawsuit against Rexene in federal district court, alleging violations of Title VII and the Texas Commission on Human Rights Act, both of which prohibit discrimination in employment on the basis of race or handicap. On June 27, 1994, Rexene filed a motion to dismiss, and the court notified the parties of its intent to treat the motion as a motion

for summary judgment. Subsequently, both parties filed their own summary judgment motions.

On October 3, 1994, the district court granted Rexene's motion for summary judgment. The court found that Vega's "failure to assert his claims as administrative expenses during the bankruptcy proceedings now results in his being barred from seeking monetary compensation for those claims in this Court. The court also concluded that Vega's "request for reinstatement clearly is a 'claim' within the meaning of the Code since monetary relief in the form of front pay is an alternative to reinstatement. [Vega's] claim for reinstatement was, therefore, discharged in the bankruptcy proceedings." Finally, the court denied Vegas request for injunctive relief, as it noted that "[u]nder the circumstances, the policy considerations of the Bankruptcy Code coupled with the fact that Plaintiff was given ample opportunity to assert his claims militates against allowing Plaintiff to pursue injunctive relief against Rexene Corporation in this Court."

II. STANDARD OF REVIEW

We review the district court's grant or denial of summary judgment de novo, "reviewing the record under the same standards which guided the district court." *Gulf States Ins. Co. v. Alamo Carriage Serv.*, 22 F.3d 88, 90 (5th Cir. 1994) (internal quotations omitted). Summary judgment is proper "when no genuine issue of material fact exists that would necessitate a trial." *Id.* In determining on appeal whether the grant of summary judgment was proper, we view all factual questions in the light most favorable to the non-movant. See *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1272 (5th Cir. 1994).

III. ANALYSIS AND DISCUSSION

Vega brings three arguments on appeal. First, he contends that his Title VII claim was not discharged because he was not given sufficient notice of the administrative claim deadline. Second, he argues that his claim for reinstatement is not discharged because it is an equitable remedy. Third, he asserts that summary judgment should not have been granted before allowing Vega to investigate whether liability insurance existed to satisfy a potential judgment against Rexene. We address each of these arguments in turn.

A. The Discharge of the Title VII Claim

Rexene filed for Chapter 11 bankruptcy protection on October 18, 1981. Vegas employment was terminated on June 10, 1992, and Rexene's plan of reorganization was subsequently confirmed on July 7, 1992. Thus, we characterize Vega's claim for monetary damages in his Title VII action as a post-petition, pre-confirmation tort claim, and neither party disputes this characterization.

Section 503 of the Bankruptcy Code addresses the allowance of administrative expenses, and Vega's post-petition tort claim is properly classified as an administrative expense. See *In re MacDonald*, 128 B.R. 161, 164 (Bankr. W.D. Tex. 1991) ("[C]ase law confirms that 'damages for a post-petition tort become an administrative expense under 11 U.S.C. § 503(b)(1)(A).'") (citing cases). As the *MacDonald* court explained, "[t]he plain language of Section 503 also emphasizes that any entity with an administrative claim that wants to share in the estate has to request payment, or risk being discharged without further recourse." *Id.*

On July 30, 1992, Vega was sent a "Notice of Final Date for Filing Administrative Claims Against the Debtors." The notice warned Vega to assert his administrative claim no later then September 8, 1992; otherwise, he would be "forever barred from asserting such Administrative Claim against any of the Debtors or any of their respective successors or assigns." Vega does not deny receiving such notice, yet he failed to request payment or to file any administrative claim.

If Vega had timely filed his administrative claim, the claim would have been preserved and he would have been given priority under the Bankruptcy Code. As we explained in *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 515-16 (5th Cir. 1994):

> The simple fact is that parties who deal with a bankrupt postpetition are frequently entitled to priority under §§ 503 and 507 of the Code, giving them an added level of protection as compared to the prepetition claimants. Additionally, the plan of reorganization cannot be confirmed under § 1129(a)(9)(A) unless the plan provides for the payment in cash and in full of persons holding "claims" for administrative expenses under §§ 503 and 507. Thus, persons holding claims against the debtor that arise post-petition are in some respects better able to protect their interests than are prepetition claimants.

As mentioned, on September 18, 1992, Rexene's plan of reorganization was consummated and Rexene was granted a discharge under 11 U.S.C. §§ 524 and 1141. Under § 1141, a confirmed plan of reorganization is binding upon a debtor and all of its creditors, and the debtor is discharged "from any debt (with certain exceptions) that arose before the date of *confirmation*". *In re Christopher*, 28 F.3d at 515; see 11 U.S.C. § 1141(a), (d). Section 524 provides that a discharge "oper-

ates as an injunction against the commencement or continuation of an action... to collect, recover or offset any such debt as a personal liability of the debtor... " Rexene's confirmation order contains provisions that mirror these statutory sections. Thus, Vega's failure to assert his tort action as an administrative claim during the relevant time period in Rexene's bankruptcy proceedings prohibits him from seeking monetary compensation in his separate Title VII lawsuit. See *In re Benjamin Coal Co.*, 978 F.2d 823, 827 (3d Cir. 1992) ("[T]he discharge of all existing claims, including administrative claims, upon confirmation of a Chapter 11 plan is unambiguous... in the Bankruptcy Code...") (citing 11 U.S.C. § 1141(d)).

Vega does not contest the fact that his claims for monetary damages were discharged. Instead, he attempts to circumvent the failure to assert his administrative claim and the prohibition on continuing his action by arguing that the July 30, 1992 notice of the administrative bar date was insufficient. Essentially, Vega contends that the notice: 1) was ambiguous; 2) failed to itemize the different types of claims that needed to be filed; and 3) failed to advise of an alleged right to file a late claim with cause. Unfortunately, Vega presented none of these arguments to the district court; thus, they are unavailing on appeal. See, *e.g.*, *Gilley v. Protective Life Ins. Co.*, 17 F.3d 775, 781 n.13 (5th Cir. 1994) ("We have held that an argument is waived if the party fails to make the argument in response to summary judgment."); *Haubold v. Intermedics. Inc.*, 11 F.3d 1333, 1336 (5th Cir. 1994) (noting that an issue not raised in the summary judgment motion below is not ripe for appellate review); *Quenzer v. United States (In re Quenzer)*, 19 F.3d 163, 165 (5th Cir. 1993) ("Typically, we will not consider on appeal matters not pre-

sented to the trial court."). Vega's claim was properly dismissed due to his failure to assert an administrative claim within the prescribed time period, and the district court correctly granted summary judgment for Rexene on this point.

B. The Reinstatement Claim

Vega asserts that the reinstatement portion of his Title VII action is not dischargeable. Because reinstatement is an equitable remedy, Vega apparently contends that his reinstatement request is not a "claim" within the meaning of the Bankruptcy Code; thus, Vega maintains that the reinstatement portion of his action is not dischargeable. Vegas original complaint requests front pay as an alternative to reinstatement: "Plaintiff states that pursuant to the wrongful discrimination he is entitled to reinstatement to his former position, or in the alternative, front pay." As Vega intimates, under Title VII, front pay is an equitable remedy that can be employed as an alternative to reinstatement. See *Hadley v. VAM P T S*, 44 F.3d 372, 376 (5th Cir. 1995) ("Front pay is an equitable remedy that can be employed when reinstatement is not feasible.").

Under the Bankruptcy Code, "claim" is defined in the following manner:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equi-

> table remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

11 U.S.C. § 101(5). In *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 999 (2d Cir. 1991), the Environmental Protection Agency ("EPA") filed a proof of claim for environmental response costs in a corporation's Chapter 11 proceedings where the corporation had been identified as a "potentially responsible party" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The Second Circuit wrestled with the distinction in § 101(5) between an "equitable remedy" and a "right to payment." The court found that the dispositive issue was "whether the injunctions, alleged to give rise to dischargeable 'claims,' impose[d] a remedy for a performance breach that gives rise to a right of payment." *Id.* at 1007. The court concluded that:

> Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a "claim." But an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a "claim" if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.

Id. at 1008. If the equitable remedy is a "claim," of course, it is dischargeable in bankruptcy. *See id.* at 1008-09.

The situation in the instant case is analogous. Reinstatement relief for Vega, to the extent that it is not imposed to prevent Rexene from committing future wrongs, is a "claim," and is dischargeable, if Vega has the option of converting the relief into a monetary obligation. In *Sheerin v. Davis (In re Davis)*, 3 F.3d 113, 116-17 (5th Cir. 1993), we determined whether equitable remedies were dischargeable by analyzing whether the applicable law viewed the payment of money as an available alternative. We noted that a particular equitable remedy in that case was "analogous to an injunction preventing Davis from committing future wrongs, which is an intangible command incapable of precise monetary estimation..." *Id.* Thus, we found that "bankruptcy did not discharge this remedy." *Id.* Vegas reinstatement claim is different, however, because Title VII explicitly provides that front pay is an alternative to reinstatement, and Vega requested as much in his complaint. Therefore, Vegas claim for reinstatement was also discharged in Rexene's bankruptcy proceedings.

C. Liability Insurance

Finally, Vega argues that the district court should not have entered summary judgment without determining whether there was liability insurance available to satisfy a potential judgment. Unfortunately, Vega also failed to present this argument to the district court; therefore, we do not consider it on appeal. See *e.g., Gilley*, 17 F.3d at 781 n.13; *Haubold*, 11 F.3d at 1336; *Quenzer*, 19 F.3d at 165.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

RAYMOND P. VEGA	:	
v.	:	MO-94-CA-103
REXENE CORPORATION	:	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

BEFORE THIS COURT are the Motions for Summary Judgment of the above-named parties. Defendant REXENE CORPORATION ("REXENE") filed a Motion to Dismiss and for Imposition of Sanctions Including Attorneys' Fees and Brief in Support Thereof on June 27, 1994. Plaintiff filed a Response to the Motion to Dismiss on July 8, 1994 and Defendant's Reply was filed July 21, 1994. The Court thereafter notified the Parties of its intent to treat the Motion to Dismiss as one for summary judgment in accordance with Rules 12(b) and 56. Both Parties subsequently filed Motions for Summary Judgment apprising the Court they had no additional material to present in support of summary judgment.

Having reviewed the Motions for Summary Judgment, the material proffered in support of the Motions, and the relevant legal authorities, it is the opinion of the Court there is no genuine issue of material fact that Plaintiff's cause of action is barred. Defendant REXENE is, therefore, entitled to judgment as a matter of law.

BACKGROUND

Defendant REXENE filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on October 18, 1991, in the Bankruptcy Court for the United States District of Delaware (the "Bankruptcy Court"). As a REXENE employee, Plaintiff RAYMOND VEGA was scheduled as a potential creditor and received various notices and mailings sent to REXENE's creditors during the course of the bankruptcy proceedings. Plaintiffs employment with Defendant was terminated on June 10, 1992. On July 7, 1992, the Bankruptcy Court entered its Order Confirming First Amended Plan of Reorganization (the "Confirmation Order") in REXENE's bankruptcy proceedings. The Confirmation Order fixed September 8, 1992, as the deadline for filing administrative claims against REXENE. A notice of the confirmation and the deadline for filing administrative claims was mailed to Plaintiff on July 30, 1992. Plaintiff did not file any administrative claims.

On September 11, 1992, in accordance with the Confirmed Plan of Reorganization ("the Plan"), REXENE was merged into Rexene Products Company. Rexene Products Company subsequently changed its name to Rexene Corporation. The Plan was consummated on September 18, 1992, and Defendant REXENE was granted a discharge pursuant to 11 U.S.C. §§ 524 and 1141.

Plaintiff filed his Original Complaint in this Court on May 19, 1994, alleging violations of Title VII and the Texas Commission on Human Rights Act, both of which prohibit discrimination in employment on the basis of race or handicap.[1]

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[1] Although Defendant reads Plaintiffs Original Complaint as encompassing a cause of action for violation of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., the Court declines to infer such a cause of action from Plaintiff's pleadings and the documents submitted in support of his Motion for Summary Judgment.

In its Motion for Summary Judgment, REXENE requests judgment as a matter of law that (1) Plaintiff's claims are administrative claims which arose during the pendency of REXENE's bankruptcy and were discharged in accordance with 11 U.S.C. § 1141; and (2) Plaintiff is enjoined by 11 U.S.C. § 524 from pursuing his claims against REXENE. Plaintiff, in turn, argues (1) to the extent he is requesting injunctive relief, his lawsuit is not a "claim" within the meaning of the Bankruptcy Code and may be pursued; or (2) for equitable reasons, Plaintiff should be allowed to pursue his claims against Rexene Corporation, the successor of Defendant REXENE.

REXENE also requests that this Court impose sanctions, in the form of reasonable attorney's fees and expenses incurred in the defense of this matter, for what REXENE argues is Plaintiff's failure to adequately investigate his claims, flagrant disregard of black letter law, and persistence in pursuing claims which have been discharged in the bankruptcy proceedings.

DISCUSSION

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 975 (5th Cir. 1991); *Hogue v. Royse City, Tex.*, 939 F.2d 1249, 1252 (5th Cir. 1991). "Summary judgment procedure is properly regarded not as a disfavored procedural

shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrell,* 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby,* Inc., 477 U.S. 242, 248 (1986).

Characterization of Plaintiff's Requests for Monetary Compensation

REXENE characterizes Plaintiff's claims for monetary damages resulting from his termination as post-petition, pre-confirmation administrative expenses, and Plaintiff does not challenge this characterization. REXENE argues that since Plaintiff failed to file a request for payment of these administrative expenses in accordance with the Bankruptcy Code, he is now precluded from seeking compensation for these expenses in this lawsuit. Plaintiff appears to agree with this reasoning and, finding no authority to support any position to the contrary, the Court must also agree.

"In any bankruptcy case, there is a delineation between pre and post-petition debt. Proofs of claim for pre-petition debt are required before a stated bar date in a Chapter 11 case if a creditor is listed in debtor's schedules as holding a disputed claim. If it is a claim for administrative expenses only, a request for payment is required. 11 U.S.C. § 503." *Matter of 1880 Superfine Lane, Inc.,* 122 B.R. 665, 667 (Bankr. D. Del. 1990).

Claims for post-petition, pre-confirmation administrative expenses are dealt with by the Bankruptcy Code as follows:

> (a) An entity may file a request for payment of an administrative expense.
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including
>
> (l)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case ...

11 U.S.C. § 503. "The term 'including' in Section 503(b) indicates that administrative expenses are not limited to those listed in the statute, while case law confirms that damages for a post-petition tort become an administrative expense under 11 U.S.C. § 503(b)(1)(A).'" *In re McDonald*, 128 B.R. 161, 164 (Bankr. W.D. Tex. 1991) (citations omitted). Plaintiff's claims for money damages for wrongful termination, therefore, are properly characterized as administrative expenses.

In order to be reimbursed for administrative expenses, a claimant must file a request for payment of the expenses in the Bankruptcy Court. "The plain language of Section 503... emphasizes that any entity with an administrative claim that wants to share in the estate has to request payment, or risk being discharged without further recourse. Subsection (b) sets up the process for allowance of such 'requests' ..." *Id.* at 164.

The language of the statute is clear: administrative expenses *shall* be allowed after notice and a hearing. Plaintiff does not deny that he received notice he had a potential administrative claim against the estate in bankruptcy. Undisputed summary judgment evidence reveals Plaintiff was sent a "Notice of Final Date for Filing Administrative Claims Against the Debtor" on July 30, 1992, warning him failure to assert an administrative claim by filing a proof of claim no later than September 8, 1992 would result in his being "forever barred from asserting such Administrative Claim against any of the Debtors or any of their respective successors or assigns." (Vandervalk Aff. Exhibit A.)

Persons holding claims such as those asserted by Plaintiff must present their claims to the Bankruptcy Court for estimation. "The estimation of an unliquidated or contingent administrative claim such as the post-petition tort claim is essential prior to the hearing on confirmation of a plan, in order for the court to evaluate the feasibility of the plan without unduly delaying the confirmation process. *Id.* In addition, estimation ensure[s] that Debtors receive a 'fresh start' 'without the threat of lingering claims riding through the bankruptcy,' *In re Baldwin-United Corp.*, 55 B.R. 885, 898 (Bankr. S.D. Ohio 1985)." *In re National Gypsum Co.* 139 B.R. 397, 405 n. 19 (Bankr. N.D. Tex 1992).

Plaintiff, had he timely filed his request for compensation and had the Bankruptcy Court been given an opportunity to estimate his claim, would have been given priority under the Bankruptcy Code as the holder of a claim for administrative expenses.

> The simple fact is that parties who deal with bankrupt postpetition are frequently entitled to priority

> under §§ 503 and 507 of the Code, giving them an added level of protection as compared to the prepetition claimants. Additionally, the plan of reorganization cannot be confirmed under § 1129(a)(9)(A) unless the plan provides for the payment in cash and in full of persons holding "claims" for administrative expenses under §§ 503 and 507. Thus, persons holding claims against the debtor that arise postpetition are in some respects better able to protect their interests than are prepetition claimants.

Matter of Christopher, 28 F.3d 512, 515-16 (5th Cir. 1994). In other words, Plaintiff had "enhanced rights under the Code." *Id.* at 519. Plaintiff was notified of these rights and did nothing to preserve them.

On September 18, 1992, the Plan was consummated and REXENE was granted a discharge pursuant to the terms of the Plan and 11 U.S.C. §§ 524 and 1141. "Section 1141(d)... says that plan confirmation discharges, 'the debtor from any debt that arose before the date of such confirmation.' " *In re McDonald* at 164 (citing 11 U.S.C. § 1141(d)(1)(A)); *see also Matter of Christopher,* 28 F.3d at 515. Plaintiff's failure to assert his claims as administrative expenses during the bankruptcy proceedings now results in his being barred from seeking monetary compensation for those claims in this Court.

To the extent Plaintiff's Original Complaint seeks monetary compensation (including compensatory and punitive damages, back pay and benefits, pre-judgment and post-judgment interest, and attorney's fees and costs), those claims are barred, and REXENE is entitled to judgment as a matter of law on those claims.

Injunctive Relief

Plaintiff argues that to the extent he is seeking injunctive relief, his request for relief is not a "claim" within the meaning of the Code and, therefore, was not discharged and may be pursued in this lawsuit. A close inspection of Plaintiff's Original Complaint reveals he is seeking two types of injunctive relief: (1) a "permanent injunction enjoining Defendant, its officers, agents, successors, employees, attorneys, assigns, and other representatives, and all those acting in concert with them and at their direction from engaging in any employment policy or practices which discriminate against employees or members on the basis of disability;" and (2) "an order to reinstate Plaintiff to his position of employment, equivalent position of employment, or the position of employment he would have enjoyed but for the discrimination." It is important to note the Original Complaint also requests front pay as an alternative to reinstatement: "If the Court finds that reinstatement is not a proper alternative, order front pay be paid to Plaintiff."

Under the Bankruptcy Code, "claim" means

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured ...

11 U.S.C. § 101(5).

Plaintiff cites *In Re Chateaugay Corp.*, 944 F.2d 997 (2nd Cir. 1991)[2] in support of his argument that a request for injunctive relief is not a "claim". In that case, the Environmental Protection Agency ("EPA") filed proofs of claims in a corporation's Chapter 11 bankruptcy proceedings for environmental response costs the EPA had incurred under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601 et seq. The debtor corporation had been found to be a party potentially responsible for response costs under CERCLA.

The *Chateaugay* Court wrestled with the distinction made by the Code between an "equitable remedy" and "a right to payment." The Court found the dispositive issue was "whether the injunctions, alleged to give rise to dischargeable 'claims', impose[d] a remedy for a performance breach that gives rise to a right of payment." *Id.* at 1007. The Court held, *inter alia:*

> Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a "claim." But an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution,

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[2]Although not specifically noted in the opinion, Chateaugay appears to have been an appeal of the decision of the District Court in a declaratory judgment action involving an ongoing pre-confirmation bankruptcy proceeding. As noted earlier, Plaintiff VEGA did not assert any of his claims prior to the confirmation of REXENE's bankruptcy.

> is a "claim" if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.

Id. at 1008.

In the case at bar, Plaintiff is requesting the equitable remedy of an injunction to prevent future employment discrimination. Plaintiff is also requesting that the Court order REXENE or its successor, Rexene Corporation, reinstate him to a position of employment. Reinstatement is also a form of equitable relief. Plaintiff argues that the Court should draw an analogy between these remedies for employment discrimination and those provided by CERCLA against environmental polluters as discussed in *Chateaugay.*

Having carefully reviewed Plaintiff's argument in light of *Chateaugay,* the Court believes the following a fair statement of this case as it stands before the Court: Since there is no option for Plaintiff to accept payment in lieu of continued employment discrimination, any relief granted by this Court that to any extent ends or ameliorates continued discrimination is not a "claim". But any relief granted Plaintiff to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing discrimination is a claim if Plaintiff has the option of converting the relief into a monetary obligation. *See also Matter of Davis,* 3 F.3d 113, 117 (5th Cir. 1993) (where the remedy is imposed in order to prevent further inequitable conduct, money is not an alternative and, therefore, the remedy is not dischargeable).

To summarize, to the extent that Title VII provides a right to payment in lieu of an order of reinstatement, that

right is a "claim" and is dischargeable in bankruptcy. Any order that the employer cease discriminating would not be a claim dischargeable in bankruptcy. Under this reasoning, Plaintiffs request for an injunction to prevent future employment discrimination by REXENE (assuming the company is still a viable entity), is not a "claim" within the meaning of the Code, was not discharged by REXENE's bankruptcy, and arguably may be pursued by Plaintiff in this lawsuit. However, his request for reinstatement clearly is a "claim" within the meaning of the Code since monetary relief in the form of front pay is an alternative to reinstatement. His claim for reinstatement was, therefore, discharged in the bankruptcy proceedings.

Injunctive Relief Against REXENE's Successor

It may still be possible for Plaintiff to pursue non-monetary relief or relief which is not capable of being reduced to money. However, whether injunctive relief can be granted against REXENE's successor is another matter altogether.[3] Plaintiff argues he should be allowed to pursue this lawsuit against the newly formed Rexene Corporation since failure to hold that corporation liable for the discriminatory practice of its predecessor, Defendant REXENE, would emasculate the provisions of Title VII providing for relief and compensation for employment discrimination. The remaining question left to be dealt with by the Motions for Summary Judgment, therefore, is whether Plaintiff may pursue an

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3 Plaintiff does not argue the viability of REXENE as a corporate entity against whom injunctive relief could be imposed. The Court, therefore, will not address that issue but will assume Plaintiff is seeking to impose liability only upon Rexene Corporation, the successor to Defendant REXENE.

order enjoining future discrimination by Rexene Corporation.

Plaintiff invokes the doctrine of successorship set forth in *E.E.O.C. v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974), in support of this argument. In MacMillan, the Sixth Circuit reasoned

> [f]ailure to hold a successor employer liable for the discriminatory practices of its predecessor could emasculate the relief provisions of the Title VII by leaving the discriminatee without a remedy or with an incomplete remedy. In the case where the predecessor company no longer had any assets, monetary relief would be precluded. Such a result could encourage evasion in the guise of corporate transfers of ownership. Similarly, where relief involved seniority, reinstatement, or hiring, only a successor could provide. it.

Id. at 1091-92. Monetary relief, benefits, and reinstatement are no longer an issue in this case since those claims are barred. The question remains, however, whether Plaintiff may pursue an injunction against Rexene Corporation preventing future discrimination under the reasoning of *MacMillan*.

Defendant points out the defendant corporation in *Macmillan* had assumed its predecessors business in a private business transaction, and argues the doctrine of successorship is not applicable in cases in which the successor corporation arises from a reorganized bankrupt corporation. Defendant further argues the policy advanced by *MacMillan* is not applicable in this case since Plaintiff VEGA was, in fact, given an opportunity to seek relief against the alleged discrimination in REXENE's bankruptcy proceedings and failed to take advantage of the opportunity.

"The purpose of Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state. Such reorganization thus permits the rehabilitation of an ongoing business." *Lemelle v. Universal Mfg. Corp.*, 18 F. 3d 1268, 1272 (5th Cir. 1994) (quotations and citations omitted). The Fifth Circuit has allowed tort claims arising *post-confirmation* to be maintained against the successor to a company reorganized in bankruptcy. The Court reasoned that because the bankrupt corporation was not liquidated but merely reorganized and merged into the successor corporation, the successor corporation could be held liable for *post-confirmation* claims under applicable state law. Id. at 1273. Clearly, REXENE's argument that successorship is not applicable in bankruptcy proceedings is not entirely correct. See also *Howard v. Penn Cent. Transp. Co.*, 87 F . R. D . 342 (N.D. Ohio 1980) (successor to bankrupt railroad company could not be held liable for monetary relief arising out of alleged employment discrimination by the bankrupt railroad company; however, application of successorship doctrine with regard to nonmonetary relief was not precluded by existence of reorganized bankrupt company as potential defendant).

Simply confirming that claims may be asserted against successor corporations, however, does not answer the question whether the policy considerations raised by Plaintiff are applicable in this case. The Court agrees with REXENE that, under the facts of this case, the policy advanced by the doctrine of successorship set forth in *MacMillan* is not applicable. Plaintiff was undoubtedly given an opportunity to advance his claims before the Bankruptcy Court. Plaintiff was afforded the possibility of a complete remedy (compen-

sation in the bankruptcy proceedings) for his claims of employment discrimination.

The fact that Plaintiff may now be precluded from asserting his claims and being compensated for any employment discrimination is not the result of the emasculation of the relief provisions of Title VII but rather the result of Plaintiff's own failure to timely advance his claims. The legislative history of the Code indicates that Congress intended the term 'claim' to be given broad interpretation so that 'all legal obligations of the debtor, no matter how remote or contingent will be able to be dealt with in the bankruptcy case.' " *Lemelle* at 1275 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6266; and citing *Ohio v. Rovacs,* 469 U. S . 274, 279 (1985)). *See also Pennsylvania Dept. of Public Welfare v. Davenport,* 495 U.S. 552,-562 (1990) (the term "claim" should be read as broadly as possible). Under the circumstances, the policy considerations of the Bankruptcy Code coupled with the fact that Plaintiff was given ample opportunity to assert his claims militates against allowing Plaintiff to pursue injunctive relief against Rexene Corporation in this Court.

CONCLUSION

Having thus addressed all the arguments advanced by both Parties in support of their Motions for Summary Judgment, it is the opinion of this Court, Plaintiff's cause of action is barred by the consummation of REXENE's Plan of Reorganization in the Bankruptcy Court.

Having reviewed, in addition, Defendant REXENE's request for imposition of sanctions, in the form of reason-

able attorney's fees and expenses, it is the opinion of the Court sanctions are not warranted. Plaintiff, however, shall be charged with costs in accordance with 28 U.S.C. § 1920. Accordingly,

IT IS ORDERED Defendant's Motion for Summary Judgment is hereby GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion for Summary Judgment is hereby DENIED.

IN ACCORDANCE WITH the foregoing Memorandum Opinion and Order, the Court will enter Judgment in the above-captioned cause in favor of Defendant. Defendant's costs of court will be assessed against Plaintiff.

SIGNED this 3rd day of October, 1994.

/s/ LUCIUS D. BUNTON
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

RAYMOND P. VEGA	:	
v.	:	MO-94-CA-103
REXENE CORPORATION	:	

JUDGMENT

THIS COURT, by separate Order, granted the Motion for Summary Judgment of Defendant REXENE CORPORATION and denied the Motion for Summary Judgment of Plaintiff RAYMOND P. VEGA. Accordingly, the following Judgment, pursuant to Rules 56 and 58 of the Federal Rules of Civil Procedure, is appropriate:

IT IS ORDERED Defendant's Motion for Summary Judgment is hereby GRANTED.

IT IS FURTHER ORDERED costs of court are assessed against Plaintiff. See 28 U.S.C. § 1920.

SIGNED this 3rd day of October, 1994.

/s/ LUCIUS D. BUNTON
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 19 1996
CLERK

No. 95-1911

In The

Supreme Court of the United States

October Term, 1995

RAYMOND VEGA,

Petitioner,

v.

REXENE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner Raymond Vega, the Plaintiff, may maintain a wrongful termination suit for post-petition, post-plan, pre-confirmation conduct by a Chapter 11 Defendant.

2. Whether Petitioner Raymond Vega may maintain a suit for reinstatement for a wrongful termination committed by a post-petition, post-plan, pre-confirmation Chapter 11 employer.

3. Whether this case meets the criteria of Rule 10 of the Rules of the Supreme Court of the United States for review.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Colonial Refrigerated Transportation, Inc. v. Mitchell, 403 F.2d 541 (5th Cir. 1968) 10

Duryee v. Erie R.R. Co., 175 F.2d 58 (6th Cir.), cert. denied, 338 U.S. 861 (1949) 6

Gilley v. Protective Life Ins. Co., 17 F.3d 775 (5th Cir. 1994) 10

Haubold v. Intermedics, Inc., 11 F.3d 1333 (5th Cir. 1994) 10

In re Barbour, 77 B.R. 530 (Bankr. E.D. N.C. 1987) 6

In re Benjamin Coal Co., 978 F.2d 823 (3d Cir. 1992) 7

In re Braun, 141 B.R. 133 (Bankr. N.D. Ohio 1992), with further proceedings at 141 B.R. 144 (Bankr. N.D. Ohio 1992) and at 152 B.R. 466 (N.D. Ohio 1993) 9

In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991) 15, 17

In re Kiker, 98 B.R. 103 (Bankr. N.D. Ga. 1988) 6

In re MacDonald, 128 B.R. 161 (Bankr. W.D. Tex. 1991) 7

In re Penn Central Transp. Co., 771 F.2d 762 (3d Cir. 1985), cert. denied, 474 U.S. 1033 (1985) 6

In re Szostek, 886 F.2d 1405 (3d Cir. 1989) 8

In re Transouth Truck Equipment, Inc., 87 B.R. 937 (Bankr. E.D. Tenn. 1988) 13

TABLE OF AUTHORITIES – Continued

Page

Matter of 1880 Superfine Lane, Inc., 122 B.R. 665 (Bankr. D. Del. 1990) 8

New York v. N.Y., N.H. & H. R. Co., 344 U.S. 293 (1953) 12

Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) 11, 12

Ohio v. Kovacs, 469 U.S. 274 (1985) 17

Quenzer v. United States (In re: Quenzer), 19 F.3d 163 (5th Cir. 1993) 10

Sequa Corp. v. Christopher, 28 F.3d 512 (5th Cir. 1994) 8

AUTHORITIES

11 U.S.C. §101(5) 16, 17

11 U.S.C. §501 7

11 U.S.C. §502 7

11 U.S.C. §503 ..... 5, 8

11 U.S.C. §503(a) 11

11 U.S.C. §507 8

11 U.S.C. §507(a)(1) 11

11 U.S.C. §524 ..... 4, 5, 7, 8, 9

11 U.S.C. §524(a) 8

11 U.S.C. §1129(a)(9)(A) 8

11 U.S.C. §1141 ..... 4, 5, 7, 8

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. §1254(1) 1

H.R. Rep. No. 595, 95th Cong., 1st Sess. 309, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6266 17

Rule 10 of the Rules of the Supreme Court of the United States..... 5, 18, 19

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

REXENE CORPORATION, ("Rexene"), files this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Response"), asking this Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued on June 20, 1995 by the U.S. Court of Appeals for the Fifth Circuit. In support of this request, Rexene respectfully shows the Court as follows:

JURISDICTION

The Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on June 20, 1995. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Refer to Statement of the Case filed by Petitioner for the nature of the case, the course of proceedings, the disposition in the U.S. District Court and the filing of an appeal to the United States Court of Appeals for the Fifth Circuit.

Additionally, Respondent would note that the U.S. Court of Appeals for the Fifth Circuit affirmed the District Court judgment on June 20, 1995.

STATEMENT OF FACTS

Petitioner Raymond Vega ("Petitioner" or "Vega") was initially employed by a predecessor of Rexene on May 14, 1974. In October of 1990, Petitioner injured his back at work. As a result of that injury, he left work in November 1990 and did not return until May 13, 1991. On July 22, 1991, Vega again left work because of his back problems and almost a year later when he was terminated he still had not returned to work. Vega was terminated on June 10, 1992 after his doctors advised he would not be able to lift more than 20 pounds in the future, a restriction that would not allow him to perform his job duties as a mechanic in a petrochemical plant. Vega sought total and permanent disability workmen's compensation based on his back injuries (App. Sec. III, 75).[1]

Old Rexene Corporation, Rexene Products Company and Poly-Pac, Inc. filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Code") on October 18, 1991 in the Bankruptcy Court for the United States District of Delaware (the "Bankruptcy Court"). The cases were consolidated for administrative purposes only.

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[1] References herein to an Appendix refer to the Appendix filed with the United States Court of Appeals for the Fifth Circuit.

When the bankruptcy proceedings were filed in October 1991, Rexene scheduled all of its then employees as creditors. Consequently, Petitioner was scheduled as a creditor and received the notices and mailings sent to Rexene's creditors during the course of the bankruptcy proceedings (App. Sec. III, 48-49).

On July 7, 1992, the Bankruptcy Court entered its Order Confirming First Amended Plan of Reorganization (the "Confirmation Order") in Rexene's bankruptcy proceedings (App. Sec. III, 23-44). Among other things, the Confirmation Order set September 8, 1992 as the deadline for the filing of administrative claims against Rexene (App. Sec. III, 35-36).

On July 30, 1992, Rexene caused to be mailed a Notice of Final Date for Filing Administrative Claims Against the Debtors Other Than With Respect to (I) Obligations to Creditors or Vendors Incurred in the Ordinary Course of Business, (II) Obligations to Employees for Compensation or Benefits, (III) Claims for Product Under Exchange Agreements, (IV) Claims for Credits by Customers in the Ordinary Course and (V) Services Rendered by Professionals Retained by the Debtors or the Official Committee of Unsecured Creditors (the "Administrative Bar Date Notice") and a Notice of Confirmation of Debtors' First Amended Plan of Reorganization to all scheduled creditors including Petitioner (App. Sec. III, 52-65). The uncontroverted evidence is that Petitioner received the Administrative Bar Date Notice.

Although Petitioner was required to file an Administrative Proof of Claim if he wished to preserve the claims

asserted in his Complaint in the trial court, he failed to do so (App. Sec. III, 50).

On September 11, 1992, pursuant to the Confirmed Plan of Reorganization (the "Plan"), old Rexene Corporation was merged into Rexene Products Company, whereupon Rexene Products Company changed its name to Rexene Corporation.

On September 18, 1992 (the "Effective Date"), the Plan was consummated (App. Sec. III, 45), and, pursuant to Section 13.02 of the Plan, paragraph 8 of the Confirmation Order, and 11 U.S.C. §524 and §1141, Rexene was granted a discharge.

SUMMARY OF ARGUMENT

Petitioner was scheduled as a creditor during Rexene's Chapter 11 bankruptcy proceedings, was given actual notice of the administrative claims bar date, and failed to file a proof of claim. The notice given Petitioner meets all the requirements of due process. Thus, his post-petition but pre-confirmation Title VII claim, if any, was discharged as part of the bankruptcy proceedings and this action enjoined. Consequently, the District Court entered summary judgment for Rexene which was properly affirmed by the Fifth Circuit.

Petitioner's argument that his claim for reinstatement is an equitable one that was not discharged is also without foundation. As even Petitioner's Complaint attests, his reinstatement claim could be satisfied by money damages. Thus it is a discharged, barred claim.

Petitioner was given actual notice of the administrative bar date and thus was afforded the possibility of a complete remedy for his claims of employment discrimination. The fact that Petitioner is now precluded from asserting his claims is not the result of emasculation of the relief provisions of Title VII but rather the result of Petitioner's own inaction and failure to advance his claims in a timely manner.

Moreover, nothing about this case fits within the criteria of Rule 10 of the Supreme Court Rules for the granting of petition for writ of certiorari, nor does Petitioner even allege that it does.

ARGUMENT

A. PETITIONER'S ADMINISTRATIVE CLAIM WAS DISCHARGED AND HIS ACTION ENJOINED

Consistent with the objective of giving a reorganized entity a fresh start, the Code provides a Chapter 11 debtor with a discharge of all pre-confirmation liabilities. Section 503 of the Code requires a party whose claim arises during the pendency of the bankruptcy and pre-confirmation to file a claim or request for payment of the expenses in the Bankruptcy Court. Pursuant to Section 1141 of the Code, a confirmed plan of reorganization is binding upon a debtor and all of its creditors. Section 524 of the Code provides that the bankruptcy discharge operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any debt that has been

discharged. "The discharge and the discharge injunction are the most important components of a debtor's fresh start." *In re Barbour*, 77 B.R. 530, 531 (Bankr. E.D. N.C. 1987). See also *In re Kiker*, 98 B.R. 103, 109 (Bankr. N.D. Ga. 1988). Rexene as a Chapter 11 debtor whose Plan has been confirmed is entitled to that fresh start.

In his Complaint, Petitioner attempted to allege a cause of action for racial discrimination arising out of the termination of his employment by Rexene. If Petitioner had a claim, which Rexene has consistently denied, it arose June 10, 1992 when his employment was terminated or approximately a month prior to entry of Rexene's Confirmation Order. If he wished to preserve his claim, it was incumbent upon Vega to timely file an administrative expense proof of claim. Despite having received notice of this requirement, Vega failed to file such a claim. Thus, Vega's claim is a discharged administrative, pre-confirmation claim.

It is well established that all claims including administrative ones that have been brought, or could have been brought into the bankruptcy process, are discharged upon the confirmation of a reorganization:

> [T]he provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute . . . if courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated . . .

In re Penn Central Transp. Co., 771 F.2d 762, 767 (3d Cir. 1985), *cert. denied*, 474 U.S. 1033 (1985) quoting *Duryee v.*

Erie R.R. Co., 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949).

The Third Circuit in whose jurisdiction Rexene's bankruptcy proceedings took place reiterated this position in *In re Benjamin Coal Co.*, 978 F.2d 823 (3d Cir. 1992), where the Court found it to be "unambiguous" that confirmation of a Chapter 11 plan causes "the discharge of all existing claims, including administrative claims." *Id.* at 827.

The Confirmation Order follows the law and provides:

> 4. Upon the Effective Date, except as otherwise provided in the Plan, each Debtor shall be discharged from any and all debts that arose against it before the date of entry of this Confirmation Order to the fullest extent provided by Sections 524 and 1141 of the Bankruptcy Code whether or not a proof of claim for such debt was filed or deemed filed under Section 501 of the Bankruptcy Code, whether or not such debt is allowed pursuant to Section 502 and whether or not the holder of such claim has accepted the Plan, and whether or not such debt is known, unknown, fixed, contingent, matured, unmatured, liquidated or unliquidated.

(App. Sec. III, 89-90).

Case law makes it obvious that Vega's post-petition tort claim is properly classified as an administrative claim. See *In re MacDonald*, 128 B.R. 161, 164 (Bankr. W.D. Tex. 1991). Had Vega timely filed an administrative claim, his claim would have been preserved and he would have

been entitled to whatever damages, if any, he could prove.

> The simple fact is that parties who deal with a bankrupt post-petition are frequently entitled to priority under §503 and 507 of the Code, giving them an added level of protection as compared to the pre-petition claimants. Additionally, the plan of reorganization cannot be confirmed under §1129(a)(9)(A) unless the plan provides for the payment in cash and in full of persons holding "claims" for administrative expenses under §503 and 507. Thus, persons holding claims against the debtor that arise post-petition are in some respects better able to protect their interests than are pre-petition claimants.

Sequa Corp. v. Christopher, 28 F.3d 512, 515-16 (5th Cir. 1994). Vega had "enhanced rights under the Code" *id.* at 519, but chose not to act to preserve them.

Rexene's Plan which became effective September 8, 1991 is binding upon all creditors including Petitioner pursuant to Section 1141 of the Bankruptcy Code. *In re Szostek*, 886 F.2d 1405 (3d Cir. 1989); *Matter of 1880 Superfine Lane, Inc.*, 122 B.R. 665, 668 (Bankr. D. Del. 1990).

In order to secure Rexene's fresh start after bankruptcy the permanent injunction of Section 524 of the Code must be upheld. The U.S. Bankruptcy Court for the Northern District of Ohio, Western District explained the provisions of §524 thusly:

> In essence, Section 524(a) declares that any judgment rendered on a discharged debt in any forum other than the bankruptcy court is null and void as it affects the personal liability of the debtor. Second and perhaps more importantly,

> it contains an injunction prohibiting creditors holding discharged debts from (1) commencing an action on such debt . . .

In re Braun, 141 B.R. 133, 139 (Bankr. N.D. Ohio 1992), with further proceedings at 141 B.R. 144 (Bankr. N.D. Ohio 1992) and at 152 B.R. 466 (N. D. Ohio 1993).

Rexene's Confirmation Order follows the provisions of §524 and states:

> 5. Upon the Effective Date, (i) any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of any of the Debtors with respect to any debt discharged by this Confirmation Order, shall hereby be made null and void and (ii) the commencement or continuation of any action, the employment of process, or any act, to collect, recover or offset any debt discharged by this Confirmation Order as a personal liability of the Debtors, shall hereby be forever enjoined.
>
> (App. Sec. III, 31)

Thus, the Fifth Circuit properly affirmed the grant of summary judgment to Rexene as Petitioner's pursuit of his action was permanently enjoined and any judgment rendered would have been a nullity.

B. THE ADMINISTRATIVE BAR DATE NOTICE MEETS THE REQUIREMENTS OF DUE PROCESS

Petitioner, in his brief to the Fifth Circuit for the first time raised due process questions concerning the sufficiency of the Administrative Bar Date Notice including allegations that the notice:

- fails to itemize the multitudes of types of claims; i.e., tort, etc. that need to be filed;

- was ambiguous; and

- fails to advise of the "right" to late file a claim for cause.

None of these arguments were made in the District Court. Thus they were deemed waived by the Fifth Circuit and should not be considered by this Court either. As the Fifth Circuit explained in *Colonial Refrigerated Transportation, Inc. v. Mitchell,* 403 F.2d 541, 552 (5th Cir. 1968):

> The purpose [of Rule 46] is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his ruling and make any changes deemed advisable. It is therefore the general rule that points not raised and preserved below will not be considered on appeal.

See, also, Gilley v. Protective Life Ins. Co., 17 F.3d 775, 781 n. 13 (5th Cir. 1994) ("We have held that an argument is waived if the party fails to make the argument in response to summary judgment."); *Haubold v. Intermedics, Inc.,* 11 F.3d 1333, 1336 (5th Cir. 1994) (noting that an issue not raised in the summary judgment motion below is not ripe for appellate review); *Quenzer v. United States*

(In re: Quenzer), 19 F.3d 163, 165 (5th Cir. 1993) ("Typically, we will not consider on appeal matters not presented to the trial court."). Vega's claim was properly dismissed due to his failure to assert an administrative claim within the prescribed time period, and the district court correctly granted summary judgment for Rexene on this point.

If Petitioner's arguments are considered, it is also clear that the cases cited for the proposition that Rexene's Administrative Bar Date Notice fails to meet the requirements of due process do not support that contention. Rather, Rexene's Administrative Bar Date Notice clearly meets the due process standards set forth in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950) and cited by Petitioner. The Administrative Bar Date Notice clearly advises:

> . . . that September 8, 1992 (the "Bar Date") is the last day for any creditor, other than those creditors described in the last paragraph hereof, to assert any and all claims that such creditor wishes to assert against the above-referenced debtors arising out of or relating to the debtor's post-petition (i.e., on or after October 18, 1991) operations and activities that are entitled to administrative priority pursuant to Section 503(a) and 507(a)(1) of the Bankruptcy Code ("Administrative Claims"), by filing a proof of claim against the pertinent debtor(s). All entities which wish to assert an administrative claim and who fail to do so by the bar date shall be forever barred from asserting such administrative

> claim against any of the debtors or any of their respective successors or assigns.
>
> (App. Sec. III, 52)

The Administrative Bar Date Notice then goes on to specify the form to be used and the address the claim must be sent to. Such notice clearly afforded Rexene's creditors, including Vega, notice of the pendency of the action and an opportunity to present their claims as required by *Mullane*.

The dispositions cited by Vega from both *Mullane* and *New York v. N.Y., N.H. & H. R. Co.*, 344 U.S. 293 (1953) are irrelevant to this action. In both *Mullane* and *New York*, the debtors attempted to rely on notice by publication to block claims of creditors whose identities were reasonably ascertainable to the debtors and who should have been provided personal notice. In this case, Rexene scheduled all of its then employees as potential creditors at the time the bankruptcy petition was filed. Throughout the bankruptcy proceedings each scheduled creditor and potential creditor, including Petitioner, received a variety of notices including the Administrative Bar Date Notice.[2] Thus, the cited cases which deal with the adequacy of

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[2] Without support Petitioner on pages 9 and 10 of his Brief contends Petitioner was not given actual notice of the bankruptcy or of the confirmation hearing. As a scheduled potential creditor, Petitioner received all notices sent to scheduled creditors including notice of the bankruptcy and confirmation order. The mailing matrixes confirming such mailings were not introduced into evidence as only the notice of the administrative bar date was relevant. Petitioner never raised such a contention in the District Court and put no evidence in the record to support that contention.

notice by publication to ascertainable creditors are irrelevant to this case where actual notice was provided.

Petitioner also attempts to contend that Rexene's Administrative Bar Date Notice is ambiguous, apparently because it does not specifically list all of the various causes of action that might be considered claims subject to its purview. There is no such notice requirement and to require such notice, given the thousands of types of potential causes of action in today's modern world, would make bar date notices incredibly cumbersome and subject the debtors to endless litigation over whether a potential type of claim was properly described.

Petitioner further argues that the Administrative Bar Date Notice is somehow ambiguous with respect to this specific claim in that it exempts employees from filing claims for wages, salary, expense reimbursements, commissions, benefits and other forms of compensation. Vega, however, was no longer an employee when he received the Administrative Bar Date Notice having been terminated on June 10, 1992. Thus, that exemption is not applicable.

Although Vega's Petition for Writ implies that he was confused by the language in the notice, there is no evidence in the record supporting such an inference. Moreover, had he been confused, common sense requires that he should have done something if there was any question as to what he might be required to do. As the Bankruptcy Court noted in *In re Transouth Truck Equipment, Inc.*, 87 B.R. 937, 942 (Bankr. E.D. Tenn. 1988):

> If a holder of a claim receives a notice to file a proof of claim, it is reasonable to conclude that

> the notice was sent for a reason. Furthermore, there is usually nothing to be gained and everything to be lost by not filing a proof of claim. Thus, the claimant who receives a notice to file a proof of claim should follow common sense rule number one: "Do not ignore any order setting a deadline to file claims unless you know without a doubt that the order does not apply to your claim."
>
> The terminology of the order should not be a major source of debate. If the terminology raises a question and the order is sent to the creditor's lawyer for review, the lawyer will most likely follow the common sense rule. When in doubt and there is nothing to be lost by doing so, file a proof of claim before the deadline.

Had Petitioner followed this common sense directive, his claim would have been preserved.

Petitioner's argument that the Administrative Bar Date Notice violates the due process clause because it fails to give notice that a late filed proof of claim may be permitted by the bankruptcy court for cause is also without merit. Petitioner cites no authority for the proposition that a notice should so advise, because there is no such authority. In fact, to require such notice would be counterproductive and undermine the entire purpose of a bar date notice which is to warn claimants that their claims will be cut off if they do not act to preserve them.

Moreover, had Vega or his counsel wished to late file a proof of claim, they have had ample chance but have made no attempt to do so. In addition to actual notice of the administrative bar date that was sent to Vega on July 30, 1992, the record demonstrates that after he filed his

complaint with the EEOC, Rexene immediately advised the EEOC of its bankruptcy defense and supplied extensive documentation thereof to the EEOC (App. Sec. III, 74-105). The EEOC then informed Petitioner of Rexene's bankruptcy defense (App. Sec. III, 50).

Moreover, after service of Petitioner's Complaint on June 15, 1994, Rexene advised Vega's counsel that Petitioner's claims were discharged and barred by the Confirmation Order, and requested that the lawsuit be dismissed (App. Sec. III, 106-136). When counsel refused to dismiss the suit, Rexene filed its motion to dismiss once again asserting its bankruptcy defense. At no time up to the present has Vega ever attempted to file a proof of claim in the bankruptcy court. Vega had more than two years to file such a late claim before the District Court Judgment was entered herein and failed to do so.

C. PETITIONER'S CLAIM FOR EQUITABLE RELIEF – REINSTATEMENT – CAN BE SATISFIED BY MONETARY DAMAGES AND THUS IS A DISCHARGEABLE CLAIM

Petitioner's argument that the reinstatement portion of his Title VII claim is not dischargeable because it is a claim for equitable relief misconstrues both the Code and *In re Chateaugay Corp.*, 944 F.2d 997 (2nd Cir. 1991). Whether Plaintiff's claim for reinstatement is a dischargeable one must be analyzed pursuant to the Code. First, Petitioner's argument that since reinstatement would impact only future revenues that this is a post-confirmation matter is pure nonsense. Any claim Petitioner had including one for reinstatement arose June 10, 1992 when

he was terminated – or approximately a month prior to entry of the Confirmation Order. Thus, it is clearly a pre-confirmation claim. The fact that the remedy wouldn't be imposed until after confirmation is irrelevant to characterization of the type of claim. If Petitioner's argument was given dignity, the bankruptcy discharge and injunction would be gutted as every barred creditor would claim that since the remedy would not be awarded prior to confirmation that there was no harm done. It is the date a claimed right accrued, not when the remedy is awarded, that controls characterization of a claim as pre- or post-confirmation.

In reviewing Vega's argument it is possible that he is also alleging that his reinstatement claim is an equitable one and therefore not barred.[3] In this regard, a review of the definition of a "claim" is useful.

Section 101(5) of the Code defines a claim as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to

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[3] It should be noted that Vega premised his arguments at summary judgment on his reinstatement claim, he implicitly admitted that any claims for monetary damages have been discharged and are barred by Rexene's Confirmation Order. Thus, Vega, as the District Court correctly noted, limited the relief sought to reinstatement.

> judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

The legislative history of the Code reflects Congress' intent that the term "claim" be given broad interpretation so that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6266. The courts accordingly have given a broad and expansive reading to the term "claim." *See Ohio v. Kovacs*, 469 U.S. 274, 279 (1985). Using the Code definition, clearly Petitioner's cause of action was a claim and was discharged by the bankruptcy.

Because Vega's proposed remedy of reinstatement is pled in Paragraphs XXIV and XIX of Plaintiff's Original Complaint (App. Sec. II, 6-7) in the alternative with a claim for front pay; i.e., monetary damages, it clearly is not the type of non-dischargeable injunctive claim contemplated by *Chateaugay*. In examining what types of equitable or injunctive claims are dischargeable, the *Chateaugay* Court reviewed the Code's definition of a claim and noted that the drafters of the Code cited a claim for the equitable remedy of specific performance concerning the sale of land as a clearly dischargeable equitable remedy because it may alternatively be remedied by monetary damages. Similarly, Vega's claim, if any, for the equitable remedy of reinstatement can alternatively be satisfied by money damages. Thus, pursuant to Section 101(5) of the Code and *Chateaugay*, it is a claim and was discharged pursuant to the Confirmation Order upon Rexene's emergence from bankruptcy.

D. PETITIONER'S CASE DOES NOT MEET THE CRITERIA OF SUPREME COURT RULE 10

Supreme Court Rule 10 provides that "A petition for a writ of certiorari will be granted only when there are special important reasons therefor." Petitioner has not cited any special or important reasons why his petition should be granted because there are none. Similarly, Petitioner failed to act to preserve his claim, if any, when he was given the chance to file an administrative proof of claim, and now is asking this court for relief. Such a claim is not of the type that should be brought to or considered by this court.

Although not a controlling list of the reasons for granting certiorari, Rule 10 lists three characteristics of cases that will be considered. Petitioner's case meets none of those criteria. That it fails to meet those criteria is evidenced by Plaintiff's brief in which there is no claim that any of the criteria are met. Rather, we have a Plaintiff's claim that is so deficient that a motion to dismiss was converted to a motion for summary judgment and granted without further proceedings in the U.S. District Court and that summary judgment was summarily affirmed by the U.S. Court of Appeals for the Fifth Circuit.

CONCLUSION

None of the issues Petitioner presents is of precedential value that warrants review by this Court. Indeed, a number of the issues raised are not subject to review as they were not presented to the trial court. Petitioner

makes no claim that this case meets the criteria of Supreme Court Rule 10 for acceptance by this Court for the clear reason that it does not. The Fifth Circuit meticulously reviewed the facts and applied the correct legal standards in reaching its conclusions. For the reasons set forth herein, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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